

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHILIP J. KERRIGAN and DEPARTMENT OF THE NAVY,
PUBLIC WORKS CENTER, NAVAL STATION, San Diego, CA

*Docket No. 03-1087; Submitted on the Record;
Issued September 16, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits to zero on the grounds that he refused to cooperate with vocational rehabilitation efforts; (2) whether the Office properly denied appellant's request for a second oral hearing; and (3) whether the Office properly denied appellant's claim for lump-sum payment of disability benefits.

This case has previously been before the Board on appeal. In its February 4, 1998 decision, the Board found that the Office properly denied appellant's request for further medical treatment with Dr. James T. Webber, a Board-certified family practitioner.¹ The Board noted that there were interlocutory matters regarding appellant's claim for an emotional condition, his request for a lump-sum payment, his request for a schedule award and the directives that the Office provide appellant with vocational rehabilitation and determine his wage-earning capacity. The facts and the circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

Following the Board's February 4, 1998 decision, the Office referred appellant and a statement of accepted facts, for a second opinion evaluation with Dr. Anthony W. Salem, a Board-certified orthopedic surgeon. In his April 9 and May 25, 2001 reports, Dr. Salem opined that appellant could return to full-time work with restrictions.

Appellant requested a lump-sum payment of his disability benefits on December 7, 2001. In a letter dated December 13, 2001, the Office denied this request. On February 25, 2002 appellant requested a final decision regarding his request for a lump-sum payment of his disability benefits. By decision dated March 21, 2002, the Office denied his request.

¹ Docket No. 96-1289 (issued February 4, 1998), *reaff'd. on recon.*, Docket No. 96-1289 (issued April 15, 1999).

The Office referred appellant for vocational rehabilitation counseling December 18, 2001. In a report dated January 28, 2002, the counselor stated that appellant refused to meet with him. In a letter dated January 30, 2002, the Office informed appellant of the consequences of refusing to cooperate with vocational rehabilitation counseling and allowed him 30 days to contact the counselor.

Appellant responded on February 27, 2002. Appellant's appeal raised issues surrounding the rehabilitation claiming he was not made aware of the vocational rehabilitation and that the Office was relying on the wrong medical report. He stated that he requested that the rehabilitation counselor have the Office inform appellant of the "weight of the medical evidence." Appellant stated that the counselor did not do so and that he cancelled the meeting as the counselor did not provide the requested documentation. He stated that he did not participate in vocational rehabilitation as "the claims examiner used false medical opinion and failed to notify me regarding 'Steve' the rehabilitation counselor." Appellant also disagreed with the statement of accepted facts provided to Dr. Salem and Dr. Salem's medical conclusions. He stated that he would provide additional medical evidence from his attending physician. By decision dated May 19, 2002, the Office reduced appellant's compensation benefits to zero for refusing to cooperate with the initial stages of vocational rehabilitation.

Appellant requested an oral hearing on the reduction of his compensation on April 2, 2002. On April 25, 2002 he altered this request to ask for a review of the written record. By decision dated August 20, 2002, the hearing representative affirmed the Office's May 19, 2002 decision.²

Appellant disagreed with this decision and requested a second oral hearing on September 6, 2002. By decision dated October 1, 2002, the Branch of Hearings and Review denied appellant's request for a second oral hearing.³

The Board finds that the Office properly reduced appellant's compensation benefits to zero for refusing to cooperate with the initial stages of vocational rehabilitation.

Section 8113(b) of the Federal Employees' Compensation Act provides:

"If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the Secretary, on review under section 8128 of this title and after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his wage-

² The Branch of Hearings and Review noted that the case had previously been remanded for development of a statement of accepted facts and further development of the medical evidence regarding appellant's claim for an emotional condition. The Board also notes that there is no final decision in the record regarding appellant's request for a schedule award.

³ Following the Office's October 1, 2002 decision, appellant submitted additional new evidence. As the Office has not considered this evidence in reaching a final decision, the Board will not consider it for the first time on appeal. 20 C.F.R. § 501.2(c).

earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.”

Section 10.519(b) and (c) of the Office’s regulations provide that if a suitable position is not identified because of the failure or refusal to cooperate in the early but necessary stages of a vocational rehabilitation effort *i.e.*, meeting with nurse, interviews, testing, counseling, functional capacity evaluations or work evaluations, then the Office will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity and will reduce compensation to zero. This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of the Office.⁴

In the instant case, the vocational rehabilitation counselor stated that appellant participated in the initial telephone interview on December 17, 2001. However, he further stated that appellant gave him a very difficult time as appellant interrogated the counselor and accused others of fraudulent acts. Furthermore, appellant would not agree to meet until the counselor spoke with the Office regarding appellant’s plan for self-employment. Appellant then telephoned on January 20, 2002 to state that he would not make the scheduled meeting on Monday, January 21, 2002. He further stated that he would refuse to meet until the Office agreed to use his physician’s medical opinion rather than that of Dr. Salem, the Office second opinion physician. The counselor attempted to contact appellant by telephone, but appellant did not return his call.

In a letter dated January 30, 2002, the Office informed appellant of the consequences of his refusal to cooperate with the early stages of vocational rehabilitation counseling and allowed him 30 days to make a good effort to participate in the rehabilitation effort or offer a good reason for his failure to do so.

As of March 7, 2002 the counselor had not received any further communication from appellant. Appellant did not respond regarding any other potential meetings.

The Board finds that appellant has not established “good cause” for failing to cooperate with the initial stages of vocational rehabilitation. Even if appellant was justified in refusing to meet with the counselor on January 28, 2002, as the Office had not informed him of the need for vocational rehabilitation, once he received the January 30, 2002 letter appellant knew or should have known the importance of cooperating with the counselor and the ramification of such failure to cooperate. In regard to appellant’s disagreement with the medical evidence as represented by Dr. Salem’s April 9, 2001 and May 25, 2001 reports, appellant has failed to provide any medical evidence establishing that he is totally disabled or that he cannot perform light-duty work within the restrictions delineated by Dr. Salem. As appellant has failed to provide good cause for his failure to cooperate with vocational rehabilitation, the Office properly reduced his compensation benefits to zero.⁵

⁴ 20 C.F.R. § 10.519(b) and (c).

⁵ The Board notes that should appellant began to cooperate with his vocational rehabilitation counselor then from that point forward he will be entitled to his disability compensation.

The Board further finds that the Office properly denied appellant's request for a second oral hearing.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant ... not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."

In this case, appellant requested and received a decision following review of the written record on August 20, 2002. Following this decision, on September 6, 2002 he requested additional appeal rights from the Branch of Hearings and Review. In its October 1, 2002 decision, the Branch of Hearings and Review properly informed appellant that he was not entitled to a second hearing on the same issue as a matter of right.

The Office then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case was evidentiary and could be resolved through the submission of evidence in the reconsideration process. Therefore, the Office properly denied appellant's request for a second hearing and properly exercised its discretion in determining to deny appellant's request for a hearing as he had other review options available.

The Board further finds that the Office properly denied appellant's request for a lump-sum payment of disability compensation.

Section 10.422 of the Office regulations⁶ provides:

"(a) In exercise of the discretion afforded under 5 U.S.C. § 8135(a), [the Office] has determined that lump-sum payments will not be made to persons entitled to wage-loss benefits (that is, those payable under 5 U.S.C. § 8105 and § 8106). Therefore, when [the Office] receives requests for lump-sum payments for wage-loss benefits, [the Office] will not exercise further discretion in the matter. This determination is based in several factors, including:

- (1) The purpose of the [Federal Employees' Compensation Act], which is to replace lost wages;
- (2) The prudence of providing wage-loss benefits on a regular, recurring basis; and
- (3) The high cost of the long-term borrowing that is needed to pay out large lump sums."

In the present case, appellant made a request for a lump-sum payment of his disability compensation, *i.e.*, his compensation for loss of wages. Given the above-detailed Office

⁶ 20 C.F.R. § 10.422.

regulation, appellant would not be eligible to receive a lump-sum payment for wage-loss benefits. Therefore, the Office properly denied appellant's request for a lump-sum payment of disability compensation.

The decisions of the Office of Workers' Compensation Programs dated October 1, August 20, March 21 and 19, 2002 are hereby affirmed.

Dated, Washington, DC
September 16, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member